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**IN THE  
COURT OF APPEALS OF INDIANA**

MICHAEL ZANUSSI,  
Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

) ) ) ) ) ) ) ) )

No. 49A02-0606-CR-525

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Jeffrey Marchal, Commissioner  
Cause No. 49G06-0602-FB-34896

**February 19, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Michael Zanussi appeals his conviction for a class B felony burglary. We affirm.

## **Issue**

We restate the issue as whether the State presented sufficient evidence to support Zanussi's conviction.

## **Facts and Procedural History**

The facts most favorable to the judgment are as follows. In early 2006, Lauren Freije and Erin Boone lived together in a rental unit on Central Avenue in Indianapolis. On January 20, 2006, around 4:00 a.m., four young men arrived at the home while Freije was present but Boone was away. One of the men was Zanussi, and another was a long-time friend of Boone's. Freije called Boone to determine whether she had invited the men to the home. After Boone confirmed that she had, Freije allowed them to enter and waited with them until Boone arrived home.

The following day Freije returned home from work at sometime after 3:00 a.m. At that time, Boone was at home and sleeping. Freije entered the home carrying her purse, a case of beer, and other belongings. Freije had invited a friend to come over to the home and therefore left the front door unlocked, awaiting the guest's arrival. Freije set her purse down near the entrance to the home. She then attempted to carry the case of beer into another area of the house but dropped the case, breaking a few of the bottles.

Zanussi was outside the home when the bottles broke. Zanussi knocked on the door after hearing the crash. When no one answered, he opened the door himself. As Freije was cleaning up the broken glass, she heard the door opening and asked who it was. Zanussi did

not answer. Instead, Zanussi saw Freije's purse sitting near the entrance, walked in, took the purse, and fled the home. Freije witnessed Zanussi taking her purse and attempted to pursue him. When Freije realized that she would be unable to catch Zanussi, she returned to the home and called the police.

On February 27, 2006, the State charged Zanussi with burglary as a class B felony, theft as a class D felony, and two counts of escape as class D felonies. On May 8, 2006, the trial court found Zanussi guilty of burglary as a class B felony. Zanussi now appeals that conviction.

### **Discussion and Decision**

Zanussi argues that the evidence was insufficient to support his conviction for burglary.

When reviewing a challenge to the sufficiency of evidence, we do not reweigh the evidence or judge the credibility of witnesses. We look only to the probative evidence supporting the judgment and the reasonable inferences from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. We will uphold the conviction if there is substantial evidence of probative value to support it.

*Specht v. State*, 838 N.E.2d 1081, 1094 (Ind. Ct. App. 2005) (citations omitted), *trans. denied* (2006).

To sustain the burglary conviction, the evidence must demonstrate that Zanussi “did knowingly break and enter into the dwelling of another with the intent to commit a [theft] therein.” *Payne v. State*, 777 N.E.2d 63, 66 (Ind. Ct. App. 2002), *citing* Ind. Code § 35-43-2-1 (defining burglary). Zanussi argues that the evidence was insufficient to establish the element of “breaking” into the dwelling because the State presented no evidence of a lack of

consensual entry.

Zanussi is correct that “there can be no breaking and therefore no burglary where the owner or other authorized person consents to entry, since a consensual entry is not an unlawful or illegal entry.” *Smith v. State*, 477 N.E.2d 857, 862 (Ind. 1985). However, “lack of a consensual entry” is not an element of the crime; rather, “consensual entry” is itself an affirmative defense to the charge of burglary that must be proved by the defendant after the State has presented its *prima facie* case. *See id*; *see also Griesinger v. State*, 699 N.E.2d 279, 281-82 (Ind. Ct. App. 1998) (discussing the breaking element of residential entry), *trans. denied*. Once the defendant has properly raised the defense of consensual entry, the State must disprove consent beyond a reasonable doubt. *Griesinger*, 699 N.E.2d at 282.

Initially, the State can establish that a defendant did “break” into a structure by offering evidence that “even the slightest amount of force” was used to gain “unauthorized entry.” *Davis v. State*, 770 N.E.2d 319, 322 (Ind. 2002). “Unauthorized entry,” as used in case law definitions, does not mean entry without consent of the owner but rather entry without authorization of the State, or “illegal” entry. *Griesinger*, 699 N.E.2d at 282. Illegal entry by force (or “breaking”) can be shown as simply as providing evidence that the defendant opened an unlocked door or pushed a door, which was slightly ajar, of another’s dwelling. *Davis*, 770 N.E.2d at 322. In this case, the State offered evidence that Zanussi entered Freije’s home, without her consent, by opening her unlocked front door. Zanussi himself admits opening the unlocked door of Freije’s apartment in order to gain entry. The State’s evidence is clearly sufficient to support a finding that Zanussi broke into Freije’s home.

It was therefore left to Zanussi to contest the evidence of “breaking” by raising the defense of consensual entry. In that regard, Zanussi testified that Boone had invited him onto the property, essentially arguing that he had been given consent to enter the home by an authorized person. Zanussi argues that this testimony, which was the sole evidence of consent, was uncontroverted and, therefore, *must* be credited by the trier of fact as disproving the “breaking” element. We disagree.

With respect to evidence negating consent, the State offered Frieje’s testimony that she and her roommate had an agreement that no individual would be invited into the home without the other’s consent, and that the two never discussed Zanussi’s invitation on the night in question. The evidence was therefore not uncontroverted. Further, although it was Zanussi’s burden to prove consent as an affirmative defense, he did not call Boone to testify on his behalf, even after receiving an invitation to do so by the trial court. Finally, as noted by the State, Zanussi testified that he knocked on the door before entering. The fact that Zanussi felt compelled to knock before entering the home is inconsistent with the idea that he had Boone’s consent to enter.

Under these circumstances, it was well within the province of the factfinder to disbelieve the limited evidence of consent that was offered by Zanussi and to find that an illegal entry had occurred. As stated above, we will not invade that province by reweighing the evidence or making credibility determinations on appeal. We therefore find that the evidence was sufficient to sustain Zanussi’s burglary conviction.

Affirmed.

SULLIVAN, J., and SHARPNACK, J., concur.